National Campaign for Freedom of Expression

Finley v. NEA

THE SUPREME COURT DECIDES

Special Supplement to the *NCFE Quarterly* and the *NAAO Bulletin* July 1998

NEA "Decency and Respect" Standards Ruled Constitutional

But Supreme Court Cautions Against Using Law to Silence "Disfavored" Viewpoints

Solidly staking out the shaky middle ground, the U.S. Supreme Court ruled on June 25 that the National Endowment for the Arts may *consider* decency in awarding arts grants, but can't do much about it. The Court's decision ends a vigorous eight-year effort by the arts and free speech communities by giving those on every side of the dispute something to love and hate about it.

"The Supreme Court made a concerted effort to make the NEA politically palatable in a fairly innocuous way," said NCFE program director David Greene. Roberto Bedoya, executive director of the National Association of Artists' Organizations (NAAO), one of the plaintiffs, called the decision "extremely disappointing."

The Court upheld the law requiring the National Endowment for the Arts to consider "general standards of decency and respect for the diverse beliefs and values of the American public" in awarding grants, noting that "[a]ny content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding."

However, the Court interpreted the law as merely adding "'considerations' to the grant-making process; it does not preclude awards to projects that might be deemed 'indecent' or 'disrespectful,' nor place conditions on grants, or even specify that those factors must be given any particular weight in reviewing an application."

Significantly, the Court held that the First Amendment did apply to arts funding decisions and cautioned the endowment against using those factors to suppress unpopular viewpoints or categorically exclude certain content.

"If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case. We have stated that, even in the provision of subsidies, the Government may not 'aim at the suppression of dangerous ideas,' and if a subsidy were 'manipulated' to have a 'coercive effect,' then relief could be appropriate. . . . Unless and until [the clause] is applied in a manner that raises concerns about suppression of disfavored viewpoints, however, we uphold the constitutionality of the provision," Justice Sandra Day O'Connor wrote for the Court.

"The Court's reading of the law is unrealistic and ignores the real-world chilling effect of the 'decency and respect' language on artists, arts institutions, and the agency itself," said Marjorie Heins, senior staff attorney for the ACLU, which along with NCFE and the Center for Constitutional Rights represented the plaintiffs. "But the Court's decision does relatively little damage to the First Amendment principle that when government is supporting free expression—through arts or humanities grants, libraries, or public universities—it cannot discriminate in its funding decisions against unconventional or controversial ideas."

The Court's decision thus allows for challenges to specific grant denials, emboldening organizations who have lost local funding because of governmental disapproval of the message in their works. Both Esperanza in San Antonio (see *NCFE Quarterly*, Winter 1997, p.1) and Out North Contemporary Art Center in Anchorage (see *NCFE Quarterly*, Spring 1998, p.1) continue to consider litigation.

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On the steps of the Supreme Court (from left): plaintiff Holly Hughes; Roberto Bedoya, executive director of plaintiff National Association of Artists' Organizations; plaintiff Karen Finley; attorney David Cole; and plaintiff Tim Miller.

Justices Cold to "Chilling Effect"

Arts Advocates: Real Effects of "Decency" Rule Ignored

Reaction in the arts community to the Supreme Court's decision upholding the "decency and respect" clause focused on the Court's finding that artists and arts presenters would probably not "be compelled to steer too far clear of any 'forbidden area.'"

"What is most disheartening is that the justices did not understand the chilling effect that this language has had upon the arts community," said NAAO executive director Roberto Bedoya. "Now we are constrained by 'decency and respect,' but we don't know what these words mean. Instead we must guess, behave with caution and make publicly supported art subject to whims of governmental powers. Members of the arts community which seek support from the NEA will once again be forced to self-censor."

"It's hard to understand why the Court did not recognize the very real chilling effect the 'decency and respect' clause has had," said NCFE executive director Gary Schwartz. "Young artists and audience members especially, having come of age during a period in which artists were demonized as the source of society's ills, rather than as commentators upon them, feel the NEA has no interest in innovative art that challenges conventional ideas."

As Philip Bither, curator of performing arts at the Walker Art Center in Minneapolis, told the *Washington Post*, "We have already seen a significant impact on artists and organizations in what they can go to the endowment for. Indirectly it has had a negative impact on the range of work that is coming from living artists."

"Younger artists know they live in a country where freedom of expression is unvalued," artist Tim Miller, one of the plaintiffs in the lawsuit, told the *Los Angeles Times*. Miller said that the college students he teaches "realize that to get federal funding you have to sing the Newt Gingrich hit parade, so they are planning a career outside of that."

Holly Hughes, another plaintiff, said "Even if the court had managed to uphold the lower courts' decisions, a reassertion

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"Decency" Supporters Claim Victory

See Decision as Barring Funding For "Indecent" Art

Despite the Supreme Court's holding that the "decency and respect" clause does not categorically exclude the funding of "indecent" or "disrespectful" art or even require that the criteria be given any weight, proponents of "decency" are citing the decision in *NEA v. Finley* as heralding the end of funding what they consider to be family-unfriendly art.

"[T]he Supreme Court validated the right of the American people to not pay for art that offends their sensibilities," said Speaker of the House Newt Gingrich.

Robert Knight of the Family Research Council told the *Washington Times* that the decision "sends a strong message to individuals who pour urine on a crucifix or paint homoerotic images in the name of art, and then ask taxpayers to foot the bill."

"The American people are no longer going to have their tax dollars used to fund filth," said Jay Sekulow of the American Center for Law and Justice.

"This is a positive ruling, but it doesn't work if you don't have people at the NEA who recognize the difference between decency and indecency," Pat Trueman, director of governmental affairs for the American Family Association, told *The*

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1965

National Endowment for the Arts created by Congress to "sustain not only a climate encouraging freedom of thought, imagination, and inquiry, but also the material conditions facilitating the release of creative talent."

April 1989

The American Family Association attacks the federal funding of a Southeastern Center for Contemporary Arts program that presents a fellowship to Andres Serrano and includes his photograph *Piss Christ* in a traveling exhibit of his work. Senators Alphonse D'Amato and Jesse Helms denounce Serrano on the Senate floor.

July 12, 1989

U.S. House of Representatives cuts NEA budget by $45,000, the total amount of the grants used to assemble the Serrano and Mapplethorpe exhibits.

April 4, 1990

National Campaign for Freedom of Expression launched.

May 13, 1990

National Council on the Arts, the NEA's presidentially appointed advisory board, cancels two of three recommended grants to the Institute of Contemporary Art and defers decisions on 18 grants in the solo performance fellowship program, including grants slated for Karen Finley, John Fleck, Holly Hughes, and Tim Miller.

June 28, 1984

Representative Mario Biaggi, outraged by the NEA's support of a production of Verdi's *Rigoletto* depicting several characters as members of the Mafia, proposes a law prohibiting the use of NEA funds in "any manner to denigrate any ethnic, racial, religious, or minority group."

Andres Serrano

June 13, 1989

Fearing controversy, the Corcoran Gallery of Art cancels *The Perfect Moment*, an exhibit of the works of photographer Robert Mapplethorpe organized by the Institute of Contemporary Art in Philadelphia with NEA funding.

October 23, 1989

U.S. House and Senate pass Helms Amendment to the NEA appropriations bill prohibiting the use of all NEA funds to produce "obscene materials, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts." NEA enacts procedures requiring grant recipients to certify that they will comply with conditions of the Helms Amendment before receiving funds.

The Supreme Court Passes

No "Realistic Danger" to First Amendment Freedoms Perceived

By Ellen Yaroshefsky

Winning is always better than losing, particularly when the original issue becomes the *cause celebre* for freedom of expression. But this Supreme Court decision is less a First Amendment setback than it is a sad irony of the times. Despite press accounts of the decision, it was not so much a loss but a "pass" by the Court.

After all, it was only two Justices (Scalia and Thomas) who claim that the government is permitted to choose to fund only art that meets the government's view of "general standards of decency and respect for the diverse beliefs and values of the American public." The majority merely decided, in Orwellian fashion, that "decency and respect" were only "considerations" in the NEA grant process and there was no "realistic danger that the standard would be used to preclude certain viewpoints!" The Court was quick to point out that if it saw REAL First Amendment censorship, it would strike it down: "IF THE NEA WERE TO LEVERAGE ITS POWER TO AWARD SUBSIDIES ON THE BASIS OF SUBJECTIVE CRITERIA INTO A PENALTY ON DISFAVORED VIEWPOINTS, THEN WE WOULD CONFRONT A DIFFERENT CASE." We should remember this for future cases but it does leave one with the question, "Will the Supreme Court ever find a situation where the decision-making in government-subsidized arts constitutes a violation of the First Amendment?"

The most difficult fallout from the case is the media spin on the loss. Most people believe this decision to be a serious setback for free expression. The fear is that people will behave according to their perception of the Supreme Court's opinion and will censor themselves and the works that their institutions will sponsor. We have seen it happen repeatedly in this decade. This case may add some fuel to the fears. As always, it is advocacy for free expression and creative organizing that remains the task and hope to keep the forces of conformity at bay. We cannot rely on the Courts.

In 1990, Karen Finley, sent by NCFE founding director Joy Silverman, walked into Ellen Yaroshefsky's Soho law office and described her outrage at the denial of her grant by the NEA. That meeting led to the filing of the lawsuit ultimately decided by the Supreme Court eight years later. Yaroshefsky currently teaches at Cardozo Law School in New York.

Tim Miller (at right) and NCFE executive director Gary Schwartz

I Wasn't Surprised, but... What a Supreme Drag

by Tim Miller

While I was performing last week in Texas (the Steers and Queer State) at Theater Lab Houston, I had to pause for a tiny moment as the naked, clothespins-on-nipples climax of my show moved through me. I realized that at that exact moment industrious little District of Columbia elves were probably proofing, collating, and stapling copies of the Supreme Court decision on whether "general standards of decency" were constitutional as a criterion applied to federal funding of the arts. This was truly going to be the last roundup of the NEA 4 case.

I wasn't surprised when I heard the decision upon my return to my home in Los Angeles. This was, after all, the same Supreme Court, if not the same white men in black robes, that had decided in 1857 that African Americans could not come before the high court because they were not human beings or citizens. This was also the same court that decided in *Bowers v. Hardwick* in 1986 that it was constitutionally cool for the State of Georgia to have laws that make it illegal for gay people to have sex with one another in the privacy of their bedrooms! Understandably, I had low expectations all along that queer artists would be allowed our fair share at the Federal feedbag (that's the last cowboy reference, I promise!).

Though it didn't really surprise me, part of me was still shocked when I heard their decision early in the morning on June 25. Can the justices not understand how censorious this language is? How often seemingly bland words like "decency" or "normal" or "natural" have been used to discriminate against lesbians and gay men and as weapons against us? I spent the day of the announcement doing dozens of interviews, spinning away the soundbites like the good gay artist/activist that I am supposed to be. I was available to whoever called — *The New York Times*, the *Los Angles Times*, the Australian Broadcasting Corporation, the *Philadelphia Inquirer*, and my Mom! But late in the day it started to really hit me. The Supreme Court, the big daddy court in the land, thinks it's okay not to support artists whose voice and vision are outside the middle-of-the-suburban-mall sensibility of some fantasy America. Yikes!

I look forward to the time (in the not too distant future, I hope), when a teacher will step before a class exploring late twentieth century social movements and say, "Now, class, I know it is shocking to believe this, but there was once a time when lesbians and gay men were actually denied certain civil rights within our democratic society. The Supreme Court even supported a series of laws that constitutionally discriminated against them!"

Until that day, I'm in it for the long haul.

Tim Miller, one of the plaintiffs in NEA v. Finley, *is a solo performer whose full-evening theater works have been presented all over the world. He is Artistic Director of Highways Performance Space in Santa Monica and teaches at Cal State LA in the Department of Theater Arts and Dance.*

"I had low expectations all along that queer artists would be allowed our fair share at the Federal feedbag."

Impartial? No. A Response to The Current Political Climate

by Helen Brunner

A recent *Washington Post* front page headline declared "This Term, Supreme Court Rules to Nation's Beat... Court's Rulings Grasped Pulse of Nation." Reporter Joan Biskupic continued, "They were practical. They asked what a reasonable person would think... they captured a societal consensus.... The Justices... acknowledged the public's concern over sexually explicit or offensive material." In effect, the Justices endorsed viewpoint discrimination, responding to the current political climate rather than taking the "impartial" view espoused in childhood civics classes. Weren't we taught that the Justices are there to balance the politically motivated actions of the elected branches of government? While I've often been stung by history book lies, I remain disillusioned that only Justice Souter had the courage to dissent: "Congress's purpose in imposing the decency and respect criteria was to prevent funding of art that conveys an offensive message."

Will the right now be satisfied that Congress has done enough to stifle funding of "offensive" creative and critical inquiry? Marshall Whitman, Director of Congressional Relations for the Heritage Foundation, stated, "I think it showed clearly that Congress has the prerogative to add more restrictions. That's good news but it remains a question whether Congress will step up to the plate." They may not have to. As the last eight years show, many artists, institutions, and funders have already adopted their own content restriction through economic and/or self-censorship. It is disheartening that the highest court in the land endorsed a law which encourages viewpoint discrimination, a practice which erodes the nation's culture as well as the rights of artists.

Helen Brunner was the executive director of NAAO from 1992 to 1995. She is currently senior advisor to the Albert A. List Foundation on freedom of expression in arts and telecommunications issues and a member of the board of directors of NCFE.

Plaintiffs' attorney David Cole meets the press.

Chilling (from page 1)

that decency language was unconstitutional would do nothing to repair the damage done in the past ten years by right wing forces aided by dems in need of some political viagra...

"The duplicity and dishonesty of the majority opinion reeks of privilege; it's almost Orwellian in its double think. As a queer feminist I 'know' what decency means. It's another code word along the lines of 'states' rights' and 'family values.'"

NCFE is urging artists and presenters to resist self-censorship. "We encourage you to take the Supreme Court to task. They refuse to believe you are self-censoring, so prove them right. Make full use of your creativity, without fear of offending 'general standards of decency' or 'diverse American values,'" said Schwartz.

Jesse Helms

June 1990

NEA Chair John Frohnmayer informs Finley, Fleck, Hughes, and Miller that their grant applications have been denied.

July 1990

NEA issues Statement of Policy setting out procedure to recoup funds from grantees who violate the conditions of the Helms Amendment without sufficient justification.

November 1990

Congress amends NEA authorization to require NEA to judge artistic merit "taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public." NEA announces intent to implement "decency and respect clause" by insuring representation of diverse beliefs and values on NEA peer review panels

March 1991

Finley v. NEA is amended to include a challenge to the constitutionality of the "decency and respect" clause. The National Association of Artists' Organizations is added as a plaintiff, specifically to challenge the clause

May 23, 1990

New School for Social Research files suit challenging the constitutionality of the Helms Amendment and the NEA's anti-obscenity pledge. In August, the Bella Lewitzky Dance Foundation and Newport Harbor Art Museum will file a separate suit alleging the same

John Frohnmayer

September 1990

NCFE, ACLU and the Center for Constitutional Rights file lawsuit on behalf of Finley, Fleck, Hughes, and Miller contesting reversal of their recommended grants.

January 9, 1991

Federal court in *Lewitzky* case declares NEA certification requirement, and thus language of the Helms Amendment, unconstitutionally vague. In February NEA settles case with New School, agreeing to remove certification requirement.

Now Playing at the Supreme Court: Environmental Theater

"Why can't you talk? Why can't your feet touch the ground? You're here because you've been bad."

by Holly Hughes

It was an environmental theater piece. I'm not talking Brecht on the Beach. I mean Grandma Sylvia's Funeral and Tony n' Tina's Wedding. I will admit I have not seen either of these shows, but that hasn't stopped me from forming lots of opinions about them.

At Grandma Sylvia's Funeral you get to go to an actual funeral home and see a Jewish service. Perhaps I've avoided this show because I've been living in NYC during the AIDS epidemic, and funerals have lost their novelty. Perhaps the equation of memorial service with entertainment has nothing to do with the show's popularity. The *New York Times* ad blares: "Laugh! Cry! Eat! Three of the four basic American emotions, the other being: 'what's on tap?'"

At Tony and Tina's Wedding you get to attend an Italian wedding and reception.

I imagine this kind of theater appeals to the theatergoer that hates theater. The type of audience member that has what I regard as an unhealthy interest in what they call reality. This type of person believes in something that is called real life. Somewhere in the back of their mind they know that real life is made up, that there's always a script, a bunch of guys behind the scene with the money, that everybody's acting. But they just don't want to think about it.

The Supreme Court Show is another long-running... Hit? I'm not sure. But it's long-running and tickets are hard to get so I guess it that is one definition of a hit. The premise behind the Supreme Court is basic situation comedy: A cast made up of a stable of regulars with rotating guest spots in minor roles tackle a new set of zany problems daily. All loose ends are tied up within an hour without any apparent commercial interruptions. There is a kind of avant-garde quality to the way the dialog walks the fine between comedy and tragedy.

The biggest similarity between the Supreme Court Show and shows like Grandma Sylvia's Funeral, Tony N' Tina's wedding is that the performance occurs outside of a traditional theater space. In the theater the audience is safe. You're know who you are, you're the audience, and you know where the stage begins and ends. There's a DMZ between you and the stage. Okay, so the history of twentieth century theater is the history of people poking holes in the fourth wall. And if you go to a show someplace that calls itself a space, you know you are running the risk of being hit upside the head with a side of beef or being splattered with tempera paint. Still, you're the audience and what you are watching is only a play.

But you enter a funeral home and the architecture, the flowers, the music, everything shapes you into someone else. A mourner. In the VFW Hall you have to choose bride's side or groom's. The line between audience and performer blurs. You're not just watching, you are witnessing.

This is how it works at the Supreme Court.

You walk up dozens and dozens of marble steps. It's March in our nation's capital, no leaves yet on the trees, but already it's 100 degrees out and you know that it is the end of the world.

You enter the building, a grand edifice, reeking of the glory that was Rome, very I, Clitoris, and immediately: Sssh! No talking. Get in this line.

No, not this line. That line....

What?

Sssh, no talking! Over here.

No, over here!

What?

Sssh! No talking.

They run a tight ship at the Supreme Court, lots and lots of rules. No one knows for sure what they are but they must all be followed anyway.

You are directed to a coat check room where you can leave the coat you have brought just in case it was not the end of the world but instead a regular March day. You've also brought some baggage with you: the belief that you are a citizen living in a democracy. You are not sure why you've brought all this baggage with you, you knew they'd never let you bring it into the court, and you have friends—many of whom inhabit your own mind—that have urged you to leave this baggage behind; it's just slowing you down.

After you've waited in several lines, and thank god you have tickets, it's sold out. Ohmigod! There's Willhem Dafoe! This is the first time you've seen him in person with all his clothes on! You are shepherded thru one metal detector and are about to go thru the second when the tiny bag you're allowed to carry opens and the contents spill out all over the conveyer belt. Oh, bad moment.

The contents of your tiny purse are moving through the metal detector... a $20 bill, a tube of Revlon's "Wine with Everything" lipstick, and a beanie baby.

You are ushered into the performance space. You cannot bring a newspaper, a book, a cup of coffee, a camera, a pen, pencil, or laptop into the performance space. Members of the press are not allowed to bring writing instruments either.

The performance space or "chambers" is a cross between a Methodist church with a huge budget and the homeroom from hell. You do not get to choose which side you sit on and, of course, one of the premises informing this performance is that there are no "sides."

The author meets the press at the Supreme Court

You are seated in pews. They are not seats that look like pews, seats that recall pews. They are pews.

And this is when you realize that the architecture and constant shushing, the metal detectors and marble pillars, it's all having an effect on you. You are shrinking, getting smaller and smaller while the room seems to get larger and larger. The drapes get thicker, darker, the ceiling is farther and farther away.

When you sit in the pews you notice that your feet don't touch the ground. Being somewhat height impaired this is not unusual but you notice that no one's feet touch the ground. If Magic Johnson were here, his feet would not touch the ground.

Why can't you talk? Why can't your feet touch the ground? Why are those scary Secret Service guys glaring and pacing around with these plastic tubes running in their ears and which you imagine must be informing these no-neck monsters either that Elvis has left the building or swish and spit.

And you realize why you had to check all that baggage—the ideas you'd been dragging around about democracy and due process and citizenship—at the door. You're not here because you're a citizen participating in a democratic institution.

You're here because you've been bad. You've been very very bad and you are very lucky to be sitting with the big people because you don't deserve to be here. ALL the architectural details and the stage hands scurrying around are here to remind you: You are really going to get it now, little missy.

So you sit still and quiet and not moving for an hour, your legs going to sleep as you wait for the big people to come. This part of the show is a time out. A detention hall. You are just supposed to sit quietly soaking in your own worthlessness until Daddy gets home. Thinking of the consequences. Shrinking.

At 10 a.m. the Justices enter and they sit in giant black leather chairs that at first remind you of Lily Tomlin's Edith Ann, but when the Justices sit in the big chairs it doesn't make them look smaller. Paradoxically it makes you feel smaller and reminds you, as if you needed to be reminded, that your feet don't touch the ground.

Then the hearing begins. I am not sure why it is called a hearing. Because it doesn't seem like the Big People are interested in hearing anything the children have to say for themselves. If I had a video of the proceedings and dubbed in some moose and squirrel accents you would have a cold-war propaganda film about the mockery of justice that happens behind the Iron Curtain.

The government lawyer is up first, and his argument seems to be: this decency language, it's nothing really, doesn't mean anything, doesn't hurt anything, but let's not get rid of it! And I am reminded of how difficult it is to go and buy a T-shirt that doesn't have some little corporate monogram on it. Some little guy on a horse or that mark that looks like the check your third grade teacher made in her book when she called attendance and how these symbols are generally discreet and color-coordinated and often unaccompanied by words as if they didn't mean anything. As if they were an accessory, a silly little fashion, as opposed to the means by which we are turned into walking endorsements of capitalism....

Even the Justices make fun of this argument.

This is exactly what they do in a hearing.... They don't ask questions, really, or if they do, another one of the Justices answers it for them and then quite a few of them laugh and rock around in their big comfortable chairs....

What the Justices seem to be saying to the government lawyer is, give or take a few party of the first part elocutions, they are saying: Get outta here! You're wasting my time!

And I know this should upset me but for some reason it doesn't.

Then it's our turn. The lawyer who is arguing on behalf of NAAO and the four artists is up to bat, and I am reminded of visiting Mayan ruins in the Yucatan. One of the best-preserved features of this Mayan city was a ball court made out of light stone with sloping sides. Since it's about a hundred degrees year-round—in the Yucatan the expression "reflector oven" comes to mind when you see this structure—you can't imagine anyone playing on this court for fun. The guide explains that this game was played for religious and political reasons, that the priests who ruled this city would choose two teams of two players each to play. It was a big honor to be chosen. All the upper crust would turn out to watch. The winning side was immediately executed and their souls were believed to go directly to the pool area at the Cancun Holiday Inn with all drinks on the house. The losers became slaves. The guide

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Robert Mapplethorpe

February 1, 1992

National Council on the Arts rejects recommended grants to Franklin Furnace and Highways performance art centers after grant applications reportedly were "flagged" by acting NEA chair Anne Imelda Radice.

May 1992

Radice vetoes grants to List Visual Art Center and Anderson Gallery, overturning recommendations of the solo performance panel because the grants "would not be the best use of the Endowment's funds." Panel members suspend deliberations, citing lack of confidence in process. Radice dismisses panel and redirects solo performance funds to the arts in education panel. Stephen Sondheim and Wallace Stegner turn down National Medals of Arts in protest

June 9, 1992

U.S. district judge Wallace A. Tashima rules the "decency and respect" clause unconstitutional

November 19, 1992

Radice informs the National Alliance for Media Arts and Culture that she will veto funding for three gay and lesbian film festivals recommended for funding by peer review panels

Wallace Stegner

June 9, 1993

Following the court's ruling rejecting the government's contention that it can reject grants for political reasons, the NEA settles the claims by the individual performance artists, who receive the amounts of their vetoed grants, damages, and attorneys' fees

August 5, 1994

National Council on the Arts rejects recommended photography fellowships to Merry Alpern, Barbara DeGenevieve, and Andres Serrano, one Council member claiming the need to be "sensitive to the nature of public sponsorship" and respectful of "the clear message Congress has given."

October 1994

The NEA abolishes the longstanding practice of allowing grantees to sub-grant to other organizations and artists.

Stephen Sondheim

Now Playing (from page 3)

stresses that, win or lose, it was a big big honor to be chosen.

Our lawyer gets perhaps three words out before the Justices are all over him. And their questions go to the first place that discussions always go when you are talking about art... especially when you're talking about art about the body, especially art about bodies *othered* by race, gender, class, by HIV, bodies *othered* by their refusal of otherness... or artists who don't treat the American flag like the Shroud of Turin.

The discussion goes immediately to what about the kids and the Nazis.

Our lawyer, David Cole, tries to say something about the First Amendment but the Supremes aren't buying it. What about the kids? Suddenly art that is responsive to common standards of decency has come to mean art that three-year-olds like. We're not even talking macrame or charades, we're talking Barney.

Now the Supremes are all upset about the Nazis. They are concerned about having to buy Nazi Art... one of the guys, because they are mostly white guys wearing black dresses that they won't admit are dresses, which is I think the root of the problem. I'm going to amend that statement, the Supremes are all guys in what they won't admit are dresses, its just that Ginsburg and O'Connor have taken the drag one step farther.

Anyway, there's a clump of these guys sitting stage left and I have to say that as performers, they needed to work a bit more on character development. I was just in Iowa where there's quite a bit of fanfare about Ditto the two-headed pig. Ditto is leaving Iowa to go to live in LA as the mascot of Pigs Without Partners but the point I am trying to make is that Ditto had two heads that shared one brain and the same thing was going on at the hearing.

"So let's just say there's a painting, it's a really really good painting, but it's covered with swastikas and all sorts of bad words. Does the government have to buy this painting?"

So our lawyer bravely tries to get in a few words about the First Amendment, which clearly bores the Court.

Just answer the question, yes or no, Mr. Cole, do we have to buy Nazi Art?

Let's just set aside for a moment the fact that, as far as I know, the Nazis aren't doing a lot of art work right now, unless you count bombing clinics and holocaust denial as art forms.

But nevermind that. What I want to say is that whenever you're talking about giving a group of people their civil rights, they always say: If we do this for the African Americans, next it'll be the Nazis. If we do this for the gays—I love that expression, the gays—then the Nazis are going to want it too. Can't give it to the disabled without giving it to the Nazis.... And I realize that it's like trying to talk to my Dad's Kiwanis Club about art. Don't try to tell them about how artists and audiences are taxpayers too, don't get smart. Because we are not talking tax money, here, we are talking an allowance. And as long as you live in this house, young lady, you are going to be following our rules and the rules seem to be: be in by midnight and no making a mess with that Karen Finley in the back yard. I told you if you kept playing around with that bullwhip somebody'd get hurt, didn't I? Didn't I? So don't come crying to me. You are grounded. You are so grounded.

Once again the lawyer tries to mention something about the First Amendment but Ginsburg clearly thinks he's being smart with her... She'll have none of it... "We don't deal with abstractions here."

Wait a minute! Isn't the law like a big abstraction? I mean it's not an object, right, with physical properties... it's an abstraction!

And I think if you can't deal with abstractions, can we get someone in here who can? Can we send one of the Secret Service guys over to Kelly Girls....?

I dunno, there must be somebody out there.

Justice O'Connor has a bright idea: Why doesn't the government come up with a list of statements the government wants to support. Her suggestions: No smoking and look both ways before you cross the street. And the government will only fund those messages....

Can you see it... a whole season of "Don't Smoke" plays at On the Boards. Hallwalls will redeem itself in the eyes of the government by devoting its entire season to multi-media work that explores the dangers of jaywalking.... A few years ago a friend who's an art administrator told me we being buried alive in proposals for shows about Frida Kahlo. Dances, visual art, solos, mime, nothing but Frida. And he thought that a good fund raising idea would be to send out letters threatening to do nothing but Frida Kahlo shows for a year if people didn't send money. That would be so much better than this....

Justice Breyer: What's the problem with art and decency, isn't all great art decent by definition? And before you can respond to that one, another Supreme, the one with many heads and one brain, cuts in and says, what's your client's beef... he got his grant, didn't he?

Now of course I am used to being confused with Karen Finley, to being called Karen Finley and the three homosexuals, like some Lollapalooza wannabe. And how people forget that NAAO is a plaintiff and we all become one nightmare artist... I was once introduced as the chocolate-smeared lesbian who photographed black penises... ok, but now I can't escape the feeling that the Supremes didn't do their homework, that they didn't read the brief!

Ohmigod, did the dog eat it? What happened here? They didn't read the brief? They didn't want to hear about all the art spaces that have been shut down or threatened, the death threats and the funding cuts, the canceled shows, the literally hundreds of stories that I know all of you have lived in the past years... they just don't want to think about it....

And in mid-sentence, the big cheese says: Thank you, Mr. Cole, don't call us we'll call you and be sure to leave your picture and résumé at the door.

Holly Hughes was a plantiff in Finley vs NEA. *The author of* Clit Notes *and co-editor of* O Solo Homo, *(both by Grove Press), Hughes is currently adapting her dyke noir play,* Lady Dick, *as a solo for Dan Hurlin.*

"Decency" (from page 1)

New York Times.

Representative Steve Largent (R-OK), a leading opponent of the NEA, acknowledged that the effect of the Court's ruling was uncertain but expressed hope that the "decency and respect" clause would work to eliminate the funding of objectionable projects. And Representative Robert Livingston (R-LA) warned that any instance of NEA funding for indecent art would effectively kill the endowment.

Others looked at the decision as allowing for further regulation with respect to the NEA and all governmental subsidy programs.

"I think it showed clearly that the Congress has the prerogative to add more restrictions," Marshall Whitman, director of congressional relations for the Heritage Foundation, told the *Washington Post.*

Standards Ruled Constitutional (from page 1)

In upholding the law, the Court reversed the decision of the U.S. Court of Appeals for the Ninth Circuit and the federal district court in Los Angeles, each of which had declared it unconstitutionally vague and necessarily viewpoint-discriminatory in violation of the First and Fifth Amendments.

Ironically, the Court found the vagueness of the "decency and respect" clause to be one of its saving graces. The Court reasoned that because the language was imprecise and subjective, it was unlikely to lead to the categorical exclusion of "indecent" or "disrespectful" art.

The Court thus believed that no applicant for an NEA grant would be discouraged from fully exercising its freedom of artistic expression. This failure to perceive a "chilling effect" was widely denounced by arts advocates. (See *Justices Cold to "Chilling Effect,"* p. S1).

William Ivey, recently installed as NEA chair, hailed the decision as "an endorsement of the Endowment's mission to nurture the excellence, vitality, and diversity of the arts and a reaffirmation of the agency's discretion in funding the highest quality art in America." Ivey said the decision would not change the NEA's day-to-day operations, a statement that struck many observers as puzzling because the endowment had been forbidden from applying the decency and respect criteria since 1992.

Several advocates also cautioned that the Court's opinion contained findings that could come back to haunt the NEA. The Court found that with respect to "competitive funding," the government has wide latitude to set spending priorities and that the constitutional concern about vague regulations is diminished. According to Greene, the path has been paved for further granting restrictions. David Cole, attorney with the Center for Constitutional Rights who argued the case for the plaintiffs, warns that local governments may try to place their own "conditions" on arts funding. Such efforts could endanger local matching funds that many NEA grants require.

The lawsuit originated in 1990 as a challenge by performance artists Karen Finley, John Fleck, Holly Hughes, and Tim Miller, whose NEA grants, despite unanimous recommendations from an NEA peer review panel, were rejected by NEA chair John Frohnmayer under political pressure. Shortly after the lawsuit was filed, Congress added the "decency and respect" clause to the NEA's enabling legislation. The lawsuit was then amended to challenge the new language and to add NAAO as a plaintiff. In 1993, the four individual artists settled their original claims, receiving the amount of their grants and additional monetary damages. The Supreme Court considered only the challenge to the statutory language.

Joining Justice O'Connor in the Opinion of the Court were Chief Justice Rehnquist, and Justices Stevens, Kennedy, Ginsburg, and Breyer. Justices Scalia and Thomas strongly disagreed with the Court's reasoning—writing that the Court "sustains the constitutionality of [the law] by gutting it"—but concurred in the judgment that the law was constitutional. Scalia found that there are no "situations in which the decency and respect factors do not constitute viewpoint discrimination," but concluded that viewpoint discrimination was permissible when government grants subsidies.

Justice Souter was the lone dissenter. Noting that "the decency and respect provision is on its face quintessentially viewpoint based," Justice Souter concluded that the "[g]overnment has wholly failed to explain why the statute should be afforded an exemption from the fundamental rule of the First Amendment that viewpoint discrimination in the exercise of public authority over expressive activity is unconstitutional."

February 1995
National Council rejects funding to Urban Bush Women and Schubert Performing Arts Center

May 1995
National Council rejects grants to support exhibits at the Institute of Contemporary Art and Renaissance Society.

February 13, 1996
National Council rejects grants to Sledgehammer Theatre and a joint application by Highways and the 18th Street Arts Complex.


Karen Finley

April 24, 1996
Congress restructures the NEA as part of the 1996 appropriations process. NEA budget cut by 40 percent and almost all individual artists' grants eliminated. Congress also prohibits grants for seasonal or general operating support, requiring applicants to identify specific projects that will receive NEA funds

November 5, 1996
The U.S. Court of Appeals for the Ninth Circuit upholds the district court's ruling invalidating the "decency and respect" clause finding additionally that the clause impermissibly restricts artistic content and viewpoint

March 7, 1997
National Council rejects recommended grant to Hallwalls that was to be used to fund seven artists' residencies

March 17, 1997
Representative Peter Hoekstra writes to NEA chair Jane Alexander, calling recommended and approved grant to Canyon Cinema "very troubling." Two days later, Canyon Cinema informed that "upon further review," its application has been rejected by the NEA

April 2, 1997
Resolving to fund only projects that promote "the traditional American value system," the Mecklenburg County (NC) Commission cuts $2.5 million in funding from local arts and science council and takes on the grant-making role itself

November 14, 1997
As part of 1998 appropriations bill, Congress adds six members of Congress to the National Council on the Arts as non-voting members

June 25, 1998
The Supreme Court reverses the Ninth Circuit decision, ruling that the government can consider "decency and respect" in awarding arts grants